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IN THE
COURT OF APPEALS OF INDIANA

JOHN MOCASQUE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 22A05-1005-CR-303
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FLOYD CIRCUIT COURT
The Honorable J. Terrence Cody, Judge
Cause No. 22C01-0909-FC-2332

May 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a jury trial, Appellant-Defendant John Mocasque was convicted of Class C felony Battery by Means of a Deadly Weapon,[1] for which he received an eight-year sentence in the Department of Correction. Upon appeal, Mocasque claims that certain evidence and argument at trial violated his constitutional right to travel. In addition, Mocasque claims that the trial court abused its discretion with respect to its consideration of various sentencing factors. We affirm.

FACTS AND PROCEDURAL HISTORY

On the evening of August 28, 2009, Mason Jennings, who has bipolar disorder and characterizes himself as disabled, was walking past Valerie Harris's home in New Albany when Mocasque, who was on Harris's front porch, approached him. Mocasque asked Jennings if he knew a certain person, and he attacked Jennings when Jennings said that he did. Jennings broke loose and ran to his sister's home, where, with great fear, he grabbed his Bible and began to pray. Shortly thereafter, Harris's thirteen-year-old son, Laquantae, arrived at Jennings's sister's home and asked Jennings to step outside the door. Jennings refused and said that he did not wish to fight. Approximately five minutes later, in response to an order from Mocasque, Jennings opened the door. Mocasque entered the home accompanied by several individuals: his seventeen-year-old son Manny; Laquantae; and Travis Murphy and Caleb Yates, both of whom were sixteen. Mocasque gave Murphy a stick and told Murphy to hit Jennings. Directed by Mocasque, Manny, Laquantae, Murphy, Yates, and Mocasque hit Jennings multiple times for a period of approximately thirty minutes. They hit him with their fists, a lamp,

[1] Ind. Code § 35-42-2-1(a)(3) (2009).

a martial arts stick, a candlestick holder, and an axe handle, among other objects. As a result of the beating, Jennings sustained injuries, including to his head and his ear, for which he received staples and stitches, respectively.

On September 11, 2009, the State charged Mocasque with Class C felony battery by means of a deadly weapon. Beginning on January 25, 2010, the case was tried to a jury. At trial, the State sought to introduce evidence through New Albany Police Officer Paul Haub that Mocasque was apprehended in Atlanta, Georgia. Defense counsel objected to this testimony on relevance grounds, and the trial court overruled that objection. During closing argument the State argued that Mocasque's traveling to Georgia was evidence of flight. On January 29, 2010, Mocasque was found guilty as charged, and the trial court entered judgment of conviction.

During a February 25, 2010 sentencing hearing, the trial court sentenced Mocasque to eight years in the Department of Correction. In support of its sentence, the trial court listed as aggravating factors Mocasque's criminal history; the fact that his "crime of violence" was committed in the presence of persons under eighteen years of age, whom he influenced to participate; the fact that Mocasque was out on bond at the time of the instant crime; and the fact that the victim had a mental infirmity. Tr. p. 268. In addition, the trial court considered Mocasque's moving to Georgia during the pendency of the investigation to be an aggravating factor. The trial court found no mitigating circumstances. Mocasque subsequently filed a motion to correct error in an effort to have the trial court reduce his sentence. Following an April 22, 2010 hearing, the trial court denied the motion. This appeal follows.

DISCUSSION AND DECISION

I. Right to Travel

Mocasque's first challenge on appeal is to the trial court's admitting evidence of, and the prosecutor's closing arguments regarding, his apprehension in Georgia. Mocasque argues that evidence of and references to his apprehension in Georgia violate his constitutional right to travel. Mocasque did not raise this claim below but argues that the alleged violation of his constitutional right to travel is fundamental error.

Generally, a trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *Combs v. State*, 895 N.E.2d 1252, 1255 (Ind. Ct. App. 2008) (citing *McHenry v. State*, 820 N.E.2d 124, 128 (Ind. 2005)), *trans. denied*. Under Indiana Evidence Rule 401, evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fundamental error occurs when the record reveals a clearly blatant violation of basic and elementary principles, where the harm or potential for harm cannot be denied, and which violation is so prejudicial to the rights of the defendant as to make a fair trial impossible. *See Jewell v. State*, 887 N.E.2d 939, 942 (Ind. 2008).

Mocasque argues that evidence of a person's movement from one jurisdiction to another cannot be used against him because of his constitutional right to travel. While a chilling effect on travel can violate the federal Constitution, other considerations may outweigh an individual's interest in travel. *Baxendale v. Raich*, 878 N.E.2d 1252, 1259 (Ind. 2008). The State's interest in presenting relevant evidence of Mocasque's guilt in

its prosecution against him for felony battery is such a consideration. Indeed, relevant evidence relating to constitutionally protected activity, such as First-Amendment protected speech or Second-Amendment possession of arms, is routinely admitted in criminal trials. Here, evidence presented by the State indicated that, shortly after the beating, Mocasque was questioned by authorities; he admitted to having been in a confrontation with the victim; and he was later located in Georgia. Evidence of flight may be considered as circumstantial evidence of consciousness of guilt. *Brown v. State*, 563 N.E.2d 103, 107 (Ind. 1990). The trial court was within its discretion to conclude from the above evidence that, regardless of any other purpose Mocasque may have had in relocating, his travel to Georgia may have constituted flight. The trial court was further within its discretion to conclude that, to the extent this evidence indicated consciousness of guilt, it was relevant to the State's prosecution. The prosecutor was therefore entitled to reference this evidence during closing argument. We find no abuse of discretion, much less fundamental error, based upon any alleged violation of Mocasque's constitutional right to travel.

II. Sentence

Mocasque next claims that his eight-year sentence is excessive and suggests that a four-year advisory sentence is warranted. Mocasque cites Indiana Appellate Rule 7(B), which permits this court to exercise its own authority to modify sentences, but his argument focuses on the trial court's alleged abuse of discretion in considering various aggravating and mitigating circumstances. We will therefore confine our review to the trial court's sentencing factors.

Under the current sentencing scheme, "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *modified on other grounds on reh'g,* 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. *Id.* at 490. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." *Id.*

A trial court abuses its discretion if it (1) fails "to enter a sentencing statement at all[,]" (2) enters "a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons," (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration," or (4) considers reasons that "are improper as a matter of law." *Id.* at 490-91. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." *Id.* at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found is not subject to review for abuse of discretion. *Id.* We may review both oral and written statements in order to identify the findings of the trial court. *See McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007).

A. Aggravating Circumstances

1. Right To Travel

Mocasque first challenges the trial court's consideration of his flight as an aggravating circumstance on the grounds that it violates his constitutional right to travel. We have already concluded that this constitutional claim lacks merit.

2. Commission of Crime in Presence of Juveniles

The trial court found as an aggravating circumstance Mocasque's commission of a "crime of violence" in the presence of individuals under eighteen years of age. Tr. p. 268. Mocasque acknowledges that Indiana Code section 35-38-1-7.1(a)(4) (2009) establishes an aggravating factor under such circumstances but argues that his crime, Class C felony battery, is not an enumerated crime of violence. *See* Ind. Code § 35-50-1-2 (2009). It is true that Class C felony battery is not an enumerated crime of violence. To the extent that the trial court found that it was, and based its aggravating factor on this status, it was in error to do so. But it appears that the trial court was more generally focused upon the facts that the crime was violent and occurred with the help of multiple juveniles, whom Mocasque had influenced to participate with him. As such, this aggravator appears to be more of an assessment of the nature and circumstances of the crime, a well-settled and valid aggravating factor, which the trial court was well within its discretion to consider. *See McCann v. State*, 749 N.E.2d 1116, 1120 (Ind. 2001).

3. Criminal History

The trial court observed that Mocasque's criminal history, although not serious, was lengthy, and it considered this to be an aggravating circumstance. Mocasque points

out that many crimes he has been charged with have been dismissed and that his criminal history therefore is not adequately "lengthy" to impose a maximum sentence. Mocasque's criminal history includes convictions for battery and malicious mischief[2] in 1986; a 2000 California force offense; possession of a controlled substance in 2003; obstruction of a police officer, disorderly conduct, and a probation violation in 2004;[3] battery in 2007; public intoxication in 2008;[4] and he was out on bond for a charge of operating while intoxicated endangering a person at the time of the instant offense. While myriad other offenses were dismissed, the trial court was certainly within its discretion to deem the above criminal history lengthy. Given that this criminal history was one of several aggravating circumstances, the fact that it was not particularly egregious does not render his maximum sentence unwarranted. We find no abuse of discretion.

4. Victim's Mental Infirmity

The trial court found Jennings' mental infirmity to be an additional aggravating circumstance. Mocasque does not dispute that Jennings has bipolar disorder but argues that this does not count as a "mental infirmity." We cannot agree. Bipolar disorder is a mental illness, and Jennings was well-known in the neighborhood to have mental difficulties. The trial court was well within its discretion to deem him a particularly

[2] These are Arizona convictions.

[3] These and the possession conviction were in California.

[4] This is a Kentucky offense.

vulnerable victim. We find no abuse of discretion in the trial court's consideration of this factor.

B. Mitigating Circumstances

Mocasque argues that the trial court abused its discretion in failing to find as mitigating factors the fact that he "voluntarily" stopped beating Jennings and the fact that Jennings' injuries "only" required emergency room care. These arguments strain credulity. Mocasque beat Jennings repeatedly for thirty minutes. The fact that he ultimately stopped hardly qualifies as a mitigating circumstance. Similarly, the fact that Jennings' injuries could have required more medical intervention than stitches and staples to his head does not reduce their gravity. In any event, of course, Mocasque's Class C felony battery charge was based upon his possession of a deadly weapon, not the extent of Jennings' injuries. *See* Ind. Code § 35-42-2-1(a)(3). The trial court was well within its discretion to refuse to find these circumstances mitigating.

The judgment of the trial court is affirmed.

BAKER, J., and MAY, J., concur.